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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOHN EDWARD BLOODWORTH, Defendant and Appellant.	B289301 (Los Angeles County Super. Ct. No. YA079410)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Bythe J. Leszkay and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant John Edward Bloodworth shot and killed his wife of 39 years, Gladys Bloodworth, and his adult son, Jeremy Bloodworth. He pled not guilty by reason of insanity to the ensuing murder charges, multiple murder special circumstance allegation, and firearm enhancement allegations. A jury found him guilty of the charged crimes and allegations, and a second jury found he was sane at the time of the crimes. Defendant timely filed the instant appeal.

While his appeal was pending, the Legislature enacted Penal Code sections 1001.35 and 1001.36,[1] which created a discretionary pretrial diversion program for defendants with mental disorders. Three months later, the Legislature amended section 1001.36 to exclude from the pretrial diversion program defendants charged with certain crimes, including murder.

Defendant contends he is entitled to a remand to allow the trial court to exercise its discretion under section 1001.36. He argues the statute as originally written should apply retroactively to nonfinal cases, but its amendment should not, because it would violate the ex post facto clauses of the federal and state constitutions. Whether section 1001.36 is retroactive is a question currently pending before the Supreme Court in *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted Dec. 27, 2018, S252220 (*Frahs*). We agree with the analysis in *Frahs* and conclude section 1001.36 is retroactive. Our conclusion extends to the portion of the statute excluding from relief defendants charged with murder, which we find does not violate the ex post facto clauses. Defendant accordingly is not entitled to remand on this basis.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Defendant also argues the jury's sanity finding must be reversed. We reject his invitation to apply an atypical standard of review articulated in *People v. Drew* (1978) 22 Cal.3d 333 (*Drew*), which the Supreme Court has explained applies only in the unusual and specific context of sanity trials in which the expert evidence of insanity is uncontested. (*People v. Powell* (2018) 5 Cal.5th 921, 956-957 (*Powell*).) We instead apply the ordinary substantial evidence standard of review set forth in *Powell* and conclude the jury's sanity finding is adequately supported.

Defendant finally argues his case should be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements under section 12022.53, subdivision (h) and to consider his ability to pay fines and fees under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). Defendant has forfeited both arguments. Section 12022.53, subdivision (h) had been in effect for several months at the time of defendant's sentencing, and we presume the court was aware of its discretion thereunder. We also presume defendant would have objected to the above-minimum restitution fine the court imposed if he wished to place his ability to pay at issue. He did not, and we do not remand. The judgment is affirmed.

PROCEDURAL HISTORY

An amended information charged defendant with the murders of Gladys and Jeremy. (§ 187, subd. (a).) It further alleged the murder of Gladys was committed willfully, deliberately, and with premeditation (§ 189). The information also alleged defendant caused Gladys's and Jeremy's deaths by personally and intentionally discharging a firearm. (§ 12022.53, subd. (d).) It alleged a multiple murder special circumstance

(§ 190.2, subd. (a)(3)).

Defendant pled not guilty by reason of insanity and proceeded to a bifurcated jury trial on the issues of guilt and sanity. The jury found defendant guilty of the first degree murder of Gladys and the second degree murder of Jeremy. It also found true the multiple murder special circumstance and firearm allegations. The sanity phase ended in mistrial after the trial court found the jury was hopelessly deadlocked. The sanity phase was retried before a different jury, which found defendant was sane at the time of both murders.

The trial court sentenced defendant to life imprisonment without the possibility of parole for the first degree murder of Gladys and special circumstance allegation. It imposed an additional sentence of 25 years to life for the firearm enhancement on that count. The court imposed a consecutive sentence of 15 years to life for the murder of Jeremy, plus an additional 25 years to life for the firearm enhancement on that count. The court ordered defendant to pay a $40 court security fee for each count (§ 1465.8, subd. (a)), a $30 criminal conviction assessment for each count (Gov. Code, § 70373), and a restitution fine of $5,000 (§ 1202.4). It awarded defendant 2,684 days of custody credit, which it later increased to 2,696 days on defendant's motion.

FACTUAL BACKGROUND[2]

I. Murders and Investigation

A. Murders

Around 2:00 a.m. on October 21, 2010, defendant, who was 65 at the time, shot and killed his wife Gladys and 25-year-old son Jeremy in the family's home. Within minutes of the murders, defendant called 911 and told the dispatcher, "I think I just killed my wife and son." After the call was transferred to the Los Angeles County Sheriff's Department (LASD), defendant twice reported, "I shot 'em." In response to questions from the LASD dispatcher, defendant described his appearance and the clothes he was wearing, and stated that he would "be on the porch when you get here." After the 911 call, defendant called his other son, John, to tell him he needed to come home because defendant had killed Gladys and Jeremy. He also called his long-distance girlfriend, Clara Jackson, to tell her he would not be seeing her for a while because he had "acted a fool and killed Gladys and Jeremy."

B. Initial Investigation

LASD field training officer Michael Maxwell and his partner responded to the 911 call. Maxwell testified that defendant walked off the porch and complied with all verbal commands, though he told Maxwell something to the effect of, "you don't have to speak to me like that." Defendant testified that he did not appreciate Maxwell's use of vulgarity and believed the deputy was being "very rude" to him. While defendant was

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[2] Because defendant does not raise any issues pertinent to the guilt phase, both he and respondent drew the factual background in their respective briefings from evidence adduced at the second sanity trial. We follow their lead.

being handcuffed and placed in a patrol car, he told Maxwell that it "didn't matter" if anyone else was in the house "because they're dead."

Maxwell and other deputies secured the crime scene at the house. LASD detective Frederick Morse, who arrived on the scene around 5:00 a.m., testified that he found a semi-automatic pistol in "ready-to-fire" condition on the porch and an open, unlocked gun case on the kitchen table. In the kitchen, Morse found shattered glass on the floor and an "impact mark" on one of the lower cabinet doors. Playing cards were strewn across the kitchen and family room.

Morse found the door to Jeremy's bedroom locked but open; the faceplate and jamb of the door were damaged, and the door appeared to have been forced open. Inside the bedroom, Gladys was lying facedown on the floor. Jeremy was lying on top of her leg. Jeremy's left arm was bent and his right arm was extended away from his body. A "great deal of blood" was on the floor. Blood also was spattered on the walls and on chairs in the room. Morse found a live round of ammunition on the floor. He and other deputies recovered three expended cartridge cases on or near the floor, and found an expended bullet embedded in the wall. No bullets were found in the ceiling. The parties stipulated that all the cartridge cases and bullets were fired from the Smith & Wesson pistol found on the porch.

Deputy medical examiner Dr. Juan Carrillo testified that Gladys suffered two fatal gunshot wounds to the back of her neck. The wounds did not have sooting or stippling on them, which led Dr. Carrillo to conclude they were fired from more than 36 inches away. Jeremy sustained a single gunshot wound to the "left temple area" of his head. Dr. Carrillo found sooting within

and along the edge of the wound. He concluded the barrel of the gun was pressed against Jeremy's skin. Dr. Carrillo also found a "patterned abrasion" on Jeremy's nose that was consistent with a strike or blow to the face or nose, and an abrasion on the back of Jeremy's head. Dr. Carrillo opined both deaths were homicides.

C. Defendant's Booking and Interview

Approximately four hours after the shootings, LASD deputy Lawrence Laughlin transported defendant to the hospital for a blood alcohol screening, which showed defendant had a blood alcohol level of 0.0 at 6:35 a.m. During the trip to the hospital, defendant told Laughlin, "You can't sleep on a morning like this after you kill your son." When defendant returned to the LASD station, Maxwell booked him. Maxwell noted that defendant had normal speech and was "polite, slash, kind." He appeared oriented to time and place and did not exhibit anger or rage.

That same day, around 4:20 p.m., LASD detective Morse and sergeant Kevin Lloyd interviewed defendant. After stating he understood his *Miranda*[3] rights, defendant said, "You know right now I want to make a statement that I did shoot my uh son and my [*sic*], and I need to get someone's help because I'm in no shape to talk for myself." Defendant nevertheless proceeded with the interview. He told Morse and Lloyd that he had three or four shot glasses of tequila and "a little" whisky with ice on the evening before the shootings. He further reported "my wife and I was having some problems"—he believed Gladys was having an affair and that he had "been doing some spy work and . . . GPS and tracking here and tracking there, and I caught some stuff. I already had some stuff." Defendant explained that the tracker

[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

was a "family locator" through his cell phone plan. He told Morse and Lloyd that he did not track Gladys's alleged paramour, neighbor Harold Manyweather, because it would be illegal.

Defendant told Morse and Lloyd that the "hurtin' part" of Gladys's alleged affair was not the affair itself but its involvement of Manyweather, his neighbor and former best friend. Defendant called Manyweather in June 2010 from Louisiana, where defendant was taking care of his ailing mother, to tell him he knew about the affair. On the night of the murders, defendant also told Gladys he knew about the affair, and that he planned to kill Manyweather with his rifle if he saw him that night. Defendant surmised Gladys "got a message to" Manyweather, because his house remained unusually dark that night. Defendant explained that he did not kill Manyweather after murdering Gladys and Jeremy because he would have had to wait until around 6:00 or 7:00 a.m. for Manyweather to be out and about, and "that's lying-in-wait"; "I ain't dealing like that."

Defendant walked Morse and Lloyd through the events leading up to the murders. On October 20, 2010, Gladys told him she was going to the Torrance courthouse to testify in a case involving her church. Defendant used the family locator on his cellphone and saw that Gladys was at the courthouse parking lot. A "bird's eye view" photo of the lot showed a white pickup truck; defendant believed it was Manyweather's white truck, and that Gladys was consorting with him. When Gladys came home, she told defendant a "cock-and-bull story" about her time at court. Defendant told Gladys he did not believe her and showed her the photo of the truck.

In the evening, defendant went out to the porch with his gun, his drink, and some cigarettes. He played solitaire and

"stewed." Eventually defendant came inside, "got mad," and threw his glass at the kitchen cabinet. He also threw the playing cards.

Around 2:00 a.m., defendant "finally had enough" and took his gun to Jeremy's room, where Gladys and Jeremy were. The door was locked, so defendant "kicked it in." Jeremy was sitting in a chair near the door. As defendant stepped a few feet into the room, Jeremy "jumped up and he saw the gun and grabbed it." He pushed the gun upward and defendant fired a shot into the ceiling. Jeremy then pulled defendant's arm down and pulled the gun "right onto himself." A shot struck Jeremy in the left temple, and he fell backwards to the floor. Defendant stated that "Gladys, at that time, was pushing around Jeremy trying to get away and I pulled around and shot the bullet in her. And she fell and I shot her a second time." Defendant thought the first shot hit Gladys in the head, because he "believe[s] in head shots." She fell face first onto the floor, at which point defendant shot her a second time, in the neck. Defendant then went "straight to the telephone" and called 911, his son, and his girlfriend.

Defendant told Morse and Lloyd that he had not intended to kill either Gladys or Jeremy. He said that he "just snapped. I mean just—boom." Defendant further stated he "really can't explain it," he "just flew off." Defendant was "gonna scare" Gladys, but explained that "[a]fter Jeremy had his incident," there was "no turning back." Defendant said that he did not want to kill Jeremy: "Oh no. Hell. Oh no. Please, no."

II. Defendant's Testimony

At the second sanity trial, defendant testified to the following during his case in chief. He was born in 1945 and lived with his parents and younger brother in the segregated town of

Natchitoches, Louisiana. Gladys and her family lived there as well. Defendant's parents engaged in domestic violence between themselves "all the time," and his mother "whipped" him as punishment. Defendant was 18 years old on the single occasion his father struck him. Defendant responded by running into the house and grabbing a shotgun the family used for hunting. The gun "didn't cock for some reason," so he did not shoot his father. Defendant "had to leave home" after that and moved in with his grandmother.

In the fall of 1963, defendant enrolled at Southern University. He left school without earning his degree, moved to California, and was drafted to serve in the United States Army approximately six months later.

Defendant was trained in communications and marksmanship, assigned to a combat unit, and sent to Vietnam to fight in the ongoing war. In Vietnam, defendant traveled through the countryside in convoys, which were sometimes attacked. When the convoys came under fire, "[y]ou would fire back and do what you can do to control the fire." Defendant also participated in "search and destroy" missions, which involved killing people. Defendant "stopped counting" how many of his fellow servicemen he saw get killed but estimated the number at eight or nine. Defendant agreed he was "reluctant" to "describe the specifics of the search and destroy" missions because he "put it in the back of my mind" and "left it back there."

Defendant returned to the United States after spending one year in Vietnam. He got an "early out" from the Army due to his combat service and was honorably discharged in late 1969. Prior to returning to civilian life, defendant participated in a two-day Army seminar "on what to expect when leaving the army when

you get out, how to act coming from a stressful war situation." Participants in the seminar did not get any mental health counseling; they were advised to contact the Veterans Administration if they had "any problems or regrets or anything." Defendant never contacted the Veterans Administration.

Defendant returned to California, where he obtained a job as a clerk at the post office. Gladys, who had been teaching in Louisiana, moved to California and she and defendant married in August 1971. Their first child, John, was born in 1972, and their second child, Jeremy, was born in 1984. The family moved to the Los Angeles house across the street from the Manyweathers in 1973.

Defendant quickly rose through the ranks at the post office. He found the promotions stressful and coped by "drinking a lot." In 1977 or 1978, after about a month or two of getting drunk every night after work, defendant made an appointment at a treatment center. He did not enroll at the center, though, because he was able to help himself.

Defendant eventually served as postmaster at various post offices in the Los Angeles area. Toward the end of his career, in 1998, defendant "got a sexual harassment case." Defendant was suspended for two months while the allegations were investigated. He was reinstated without discipline, but lost his motivation and thereafter focused solely on "getting my time and getting out." Defendant sought and received mental health counseling around this time, for approximately six months. Defendant did not tell his therapist that he served in Vietnam and might have post-traumatic stress disorder (PTSD). He "didn't think I had that," because he was able to "instantly get rid" his nightly flashbacks "by changing my mind to something

different and realizing that being in Vietnam is a different world than the world I was living in."

Defendant retired from the post office in August 2003. In January 2007, he went to Louisiana to care for his mother, who was suffering from late-onset schizophrenia, cancer, and "beginning dementia." Defendant often had to stay awake at night to make sure his mother did not wander outside. He testified that it was "hard" watching his mother "deteriorate."[4]

Defendant largely stayed in Louisiana, but returned to California occasionally to see his family. Around this time, he felt a change in his relationship with Gladys. In late 2009, defendant began to have concerns that Gladys was having an affair with Manyweather. Defendant could not explain why he had those concerns; he just felt that "something was out of place" with both Gladys and Manyweather. Defendant did not talk to anyone about his concerns, because he wanted to confirm they were true first. He obtained various "spy programs" for his computer for this purpose.

In early 2010, defendant started having problems sleeping. He was staying up during the night to care for his mother, and had chores to do during the day. Defendant returned to California in February 2010 to see his doctor because he recognized that he was not "thinking straight" and "needed some help." He also wanted to "search out the suspicion" of Gladys's alleged affair.

Defendant met with a therapist two or three times in as many weeks. She did not prescribe him any medication, but he discussed his marriage with her and she provided suggestions.

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[4] Defendant's father, who had remarried, died in November 2007 at age 85. Defendant believed his father was poisoned.

Defendant did not schedule follow-up appointments with the therapist because he planned to return to Louisiana. Defendant returned to Louisiana in mid-March 2010.

In June 2010, defendant called Manyweather from Louisiana to ask him about his alleged affair with Gladys. Defendant told Manyweather "I felt that him and Gladys was having an affair and we would discuss it more when I get home." Defendant also spoke to Gladys about his suspicions "three or four[] times." She denied infidelity each time, but defendant's concerns were not allayed.

Defendant returned to California for good in late September 2010 after he secured placement for his mother in a hospice facility. He told Gladys about his own affair with Clara Jackson in Louisiana. Gladys began acting "distant." Defendant remained suspicious that she was having an affair with Manyweather.

On October 20, 2010, defendant followed Gladys to the Torrance courthouse, where she was going to be a witness in a case involving her church. After seeing that she arrived at the courthouse, defendant left and logged onto his family locator app on his phone to track her further. "The family locator indicated she was in a truck, not inside the Torrance courthouse, but outside in a truck, white truck." Defendant stated that the family locator showed him pictures of the white truck. Manyweather owned a white truck, but he was not in any of the pictures. Defendant returned home and waited for Gladys to arrive.

Gladys came home around 3:15 p.m. with some sandwiches for dinner. She and defendant ate dinner and talked. Defendant showed Gladys the pictures on the computer, and she "was just

shocked"; she had not known the family locator was on her phone.

Jeremy came home around 4:30 or 5:00 p.m. He and Gladys watched some movies in the family room while defendant sat on the porch. Around 10:00 or 10:30 p.m., Jeremy and Gladys went to Jeremy's room so they could watch movies on Jeremy's television; defendant remained on the porch. Defendant had his gun with him, because "stragglers like to start walking" by the house at night. He played solitaire on and off.

Defendant came into the house around 1:30 or 1:45 a.m. He played some solitaire and threw the cards after getting frustrated. He had a drink, and then threw the glass against the kitchen cabinet. Defendant said that he could have been angry, but did not think he was. He was tired, however; he testified that he had not slept at all during the previous seven or eight days.

Defendant decided to "see what was going on in the movie." He took his gun with him out of "habit" and did not plan to kill anyone. Defendant found the door to Jeremy's room was locked. He kicked in the door and entered the room, while simultaneously trying to unload his gun. While he was doing that, "Jeremy grabbed my arm. He pushed it up. When he pushed it up, the gun went off in the ceiling. And when he pulled it back down, the gun went off in his head."

Defendant did not recall shooting Gladys. "All I remember is the gun going off in Jeremy's head, and it really tore me up. And I don't know how I shot her, but I did." After that, defendant called 911. Defendant did not have any sleep before talking to Morse and Lloyd more than 12 hours later.

III. Defendant's Sanity Evidence

A. Dr. Diana Botezan

Dr. Diana Botezan testified that she is a staff psychiatrist

in the Twin Towers Correctional Facility. She evaluated defendant on November 3, 2010, in connection with his placement in Twin Towers. During that 30-minute evaluation, Botezan noted that defendant had a "blunted" or "flattened" affect, meaning that he showed little emotion. Defendant answered her questions appropriately and made good eye contact. Defendant told Botezan that the shootings "just happened," and that Jeremy's death was a "mistake," because "he was trying to protect his mother." Botezan observed that defendant's eyes watered when he talked about Jeremy, but she did not indicate in her notes that he showed any emotional response when discussing Gladys. Defendant denied suffering from hallucinations, paranoia, mood swings, or other mental illnesses, and did not mention Vietnam or flashbacks. Botezan diagnosed defendant with anxiety disorder not otherwise specified and noted that schizophrenia and psychotic disorder not otherwise specified both needed to be ruled out.

B. Dr. Nilda Diaz

Dr. Nilda Diaz testified that she is a clinical forensic psychologist at Patton State Hospital[5] who initially evaluated defendant in 2012. He was "very guarded, very blunted in his affect," and "very subdued." Diaz and other members of defendant's treatment team diagnosed him with delusional disorder and major depressive disorder. Diaz remained part of defendant's treatment team for about five years.

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[5] Criminal proceedings against defendant were suspended multiple times due to doubts about his competency. He initially was sent to Patton to regain competency and remained housed there when criminal proceedings resumed. The jury at his second sanity trial was not told why defendant was at Patton.

While defendant was at Patton he participated in numerous therapeutic groups. Defendant also received one-on-one treatment from Diaz. During those sessions, he was "very avoidant" of discussing Vietnam and never went into detail about his experiences there. Diaz opined that defendant "pride[d] himself in how he's been able to compartmentalize that experience in his life." She diagnosed him with "chronic-type" PTSD in 2015, when he began to exhibit heightened levels of stress, social avoidance, and sleep disturbance after being questioned about Vietnam. Diaz characterized the PTSD as "wavering, depending on the level of stress that he's experiencing and whatever triggers he's having." She opined that defendant still had "some delusional beliefs that impair his decision-making," but noted that the beliefs had become "a little bit more flexible" during the course of his treatment. Defendant showed no signs of malingering, though he had begun to experience age-related declines in his informational processing abilities.

C. Dr. Rose Pitt

Dr. Rose Pitt testified that she is a private practice psychiatrist who devotes about ten percent of her practice to forensic psychiatry. Defense counsel hired her to evaluate defendant in 2015. Over a span of nine months, Pitt reviewed defendant's medical and legal records and evaluated him five separate times, spending a total of about 15 hours with him. During those interviews, defendant described his family history of bipolar disorder and late-onset schizophrenia.

Pitt diagnosed defendant with delusional disorder and PTSD. She also thought he had an alcohol abuse disorder, and that his medical records suggested the possibility of bipolar

disorder or attention deficit hyperactivity disorder. Pitt concluded defendant was not malingering, but noted that symptoms of mental illness can "wax and wane" with a person's stress levels or receipt of treatment. For instance, she believed defendant began to experience PTSD symptoms and develop delusions after he retired due to the lack of structure and additional stress in his life.

Pitt opined that defendant was suffering from delusional disorder and "quite possibly" PTSD at the time of the murders in 2010. She further opined that defendant's "psychosis was what drove his behavior that night." Pitt noted that defendant was very consistent when he described the murders, but "he just couldn't explain what happened." She attributed defendant's lack of knowledge to either dissociation or a period of acute psychosis. Although she opined in her 52-page report that defendant was sane at the time of the murders, Pitt testified at trial two years later that defendant did not understand the wrongfulness of his actions when he killed Gladys and Jeremy.

D. Dr. Annette Ermshar

Dr. Annette Ermshar testified that she is a forensic clinical neuropsychologist. She evaluated defendant at Patton State Hospital in December 2016 to determine whether he was legally sane at the time of the murders. Her interview with defendant lasted "a good part of the day." Prior to meeting with defendant, Ermshar reviewed defendant's medical records, including reports from other evaluators, and various other documents relevant to the case. Ermshar concluded that defendant "met the criteria for a psychotic spectrum disorder." She explained that the symptoms of such disorders include disorganized and confused thinking, paranoia, and "beliefs in things that don't exist in

reality." Ermshar noted that her diagnosis was consistent with other diagnoses and evaluations in defendant's records. Like the other evaluators, she concluded that defendant was not malingering.

Ermshar opined that defendant was insane at the time of the murders because he was confused, paranoid, dissociative, and unable to appreciate the wrongfulness of his actions. She noted that defendant's "descriptions of his struggles around the time of the arrest was [*sic*] very consistent with someone who was struggling with a mental disease, defect, or disorder." Specifically, he described confused thought processes and was unable to recall the sequence of events in detail. She opined that defendant's inability to explain what happened was consistent with "a loss of contact with reality for that time period." Ermshar's opinion was not impacted by defendant's 911 call and statements to law enforcement, "because even individuals who are in a current episode of insanity still would know to pick up a phone and ask for help." She testified that mental illness and insanity can wax and wane in intervals as short as a few minutes: "it's possible that there was a three-minute, five-minute, one-minute, 15-minute period where they were insane as defined in the legal term and then gained some clarity and sort of came to enough to stabilize and maybe they wouldn't have qualified for insanity, you know, 20 minutes later."

E. Dr. Kevin Booker

Dr. Kevin Booker testified that he is a clinical psychologist and forensic trauma specialist who works with veterans suffering from PTSD. He evaluated defendant at Patton State Hospital in October 2017, spending about four hours with him. He also reviewed defendant's medical records, military records, and police

reports.

Booker diagnosed defendant with chronic PTSD related to his experiences in Vietnam. Booker further concluded defendant suffered from delusional disorder. He opined that these disorders "certainly" rendered defendant insane at the time of the murders. Booker explained that his opinion was "based exclusively" on the "mental detachment or mental dissociation" component of PTSD. Booker further explained that PTSD-related flashbacks, which most patients do not realize they are experiencing, can cause a "break with reality" that deprives the sufferer of "awareness of what's happening in that moment." Like Ermshar, Booker testified that his opinion was not impacted by defendant's 911 call. "[T]here is a threshold or a window within which a person may be implicated or involved in a dissociative episode or act or a flashback, and that episode does not go on forever. And so it's quite possible that subsequent to experiencing this dissociative flashback, the individual was able to recognize what happened and then initiate an emergency response call."

IV. Prosecution's Sanity Evidence

A. Dr. Sherif Toma

Dr. Sherif Toma testified that he is a clinical psychologist on the mental health evaluation team at the Men's Central Jail in Los Angeles. He evaluated defendant for less than 10 minutes in May 2012, and for approximately the same amount of time in July 2012.

At both evaluations, defendant appeared oriented to time and place and said he was eating and sleeping fine. Defendant did not report any significant psychological symptoms—no hallucinations, flashbacks, dissociations, anxiety, depression, paranoia, or psychoses. Toma "diagnosed him with no diagnosis,

and there's nothing wrong with him basically." Toma also stated that he reviewed a November 2010 note from defendant's medical chart, in which defendant stated, "I know what I did, and I gave up my rights to be outside in society, but I haven't given up my right to be human." Toma concluded from that note that defendant "knew what he was doing. He was oriented." His state of mind was not delusional or psychotic. Toma did not know at the time of his evaluations that defendant had reported that deputies in the jail were poisoning him and leading a drug ring.

B. Dr. Thomas Lim

Dr. Thomas Lim testified that he is a staff psychiatrist at Patton State Hospital. He led defendant's treatment team since defendant's admission to the hospital in 2013. Defense witness Dr. Diaz also was a member of that team.

Lim diagnosed defendant with delusional disorder. Defendant's predominant delusion was that his wife was cheating on him. Lim noted that most people with delusional disorder do not suffer impairment in clinical, social, or other areas. Lim also diagnosed defendant with major depressive disorder. Lim believed defendant's depression was due to his criminal case and related circumstances. Lim did not diagnose defendant with PTSD, even though Diaz mentioned "a few times" that defendant showed some symptoms, because defendant did not meet all the diagnostic criteria.

C. Dr. Bong Doan

Dr. Bong Doan testified that he is a psychiatrist who worked at Patton State Hospital until he retired in 2016. Doan assessed defendant in July 2013, upon his readmission to the hospital. Doan's evaluation of defendant took approximately two hours.

Doan diagnosed defendant with delusional disorder, paranoid type. Doan explored the possibility that defendant also had PTSD, but ultimately rejected that diagnosis because defendant denied and did not report any symptoms of PTSD and had not been treated for PTSD previously. During the evaluation, defendant was "distant" and "guarded," but spoke coherently and in a "goal-directed" fashion.

D. Dr. Phani Tumu

Dr. Phani Tumu testified that he worked part-time as a staff psychiatrist at California State University, Northridge, and worked independently as a forensic psychiatrist the remainder of the time. Tumu evaluated defendant twice, first in November 2015 and again in March 2017; Tumu also reviewed defendant's medical and legal records beforehand. The purpose of the approximately hour-long evaluations was to determine whether defendant was insane when he murdered Gladys and Jeremy.

After the November 2015 evaluation, Tumu diagnosed defendant with delusional disorder, jealous type, and alcohol abuse disorder. Other practitioners subsequently diagnosed defendant with PTSD, so Tumu evaluated him a second time "just to make sure that there wasn't something additional that I didn't see the first time." Tumu had not seen any such diagnosis in any of the records he reviewed, and did not believe defendant exhibited PTSD symptoms during the first interview.

At the second interview, Tumu assessed defendant's functional status, because "one of the criteria for P.T.S.D. is that one needs to have an impairment in social, occupational functioning in order to be diagnosed with that." Tumu asked defendant open-ended questions about his marriage,

employment, military experience, and sleep. He concluded from defendant's answers that defendant did not meet the diagnostic criteria for PTSD.

Tumu also spoke to defendant about the day of the murders. According to Tumu, defendant "actually had very good memory of the day leading up to the murder. And his memory became a little bit fazy [*sic*] as time went on that night." Defendant told Tumu that he got angry, went to Jeremy's room, and had an altercation with Jeremy, during which the gun accidentally fired. Defendant did not "remember much about shooting his wife." Tumu did not conclude from this gap in memory that defendant experienced a dissociative state at the time of the murders. He opined that dissociative states require a diagnosis of PTSD, which in his opinion defendant did not have, and pointed out that defendant gave a detailed account of the murders during his interview with law enforcement.

Tumu opined that defendant was sane at the time of the murders. Although he believed defendant was suffering from delusional disorder at the time, Tumu "did not believe that it impaired him to a degree that he did not know the nature and quality of the acts he was doing or that he did not know what he was doing was wrong at the time of the crime." Tumu explained that a jealous delusion "does not equate to insanity," and pointed to defendant's statements and guilt phase testimony, his anger about Gladys's alleged infidelity, his recognition that cheating was wrong, and a lack of evidence that he experienced persecutory delusions. Tumu also found important defendant's apparent distress over killing Jeremy: "if he had a delusional belief that his son was persecuting him, doing things to him, then he may feel that the death of his son would cause some sort of

relief, but that wasn't the case."

DISCUSSION

I. Section 1001.36

Defendant was sentenced on March 8, 2018. On June 27, 2018, while defendant's direct appeal was pending, section 1001.36 became effective. (*Frahs*, *supra*, 27 Cal.App.5th at p. 789; see Stats. 2018, ch. 34, § 24.) That statute gives the trial court discretion to grant pretrial diversion to certain criminal defendants who suffer from mental disorders.
(§ 1001.36, subd. (a).) On September 30, 2018, while defendant's direct appeal was still pending, the Legislature amended section 1001.36 to exclude defendants charged with specified crimes, including murder. (See § 1001.36, subd. (b)(2)(A); Stats. 2018, ch. 1005.) The murder exclusion took effect on January 1, 2019.

Defendant contends that section 1001.36 is retroactive and should apply in his case. He also contends, however, that the later-enacted amendment precluding relief for defendants charged with murder is *not* retroactive because it effectively increases the punishment to which he is subject. Respondent argues that section 1001.36 is not retroactive, and that even if it were, defendant would not be eligible for relief due to the murder exclusion and his inability to satisfy other eligibility criteria.

The Courts of Appeal are currently divided as to whether section 1001.36 applies retroactively. *Frahs*, *supra*, 27 Cal.App.5th 784, concluded that it does. In *Frahs*, which is currently under review by the Supreme Court, Division Three of the Fourth District found that section 1001.36 was subject to the *Estrada*[6] rule, under which the presumption against retroactivity does not apply when the Legislature reduces the punishment for

[6] *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

criminal conduct. (*Frahs*, *supra*, 27 Cal.App.5th at pp. 790-791.) The *Frahs* court found support in *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*), which considered the retroactivity of Proposition 57. In *Lara*, the Supreme Court held that although Proposition 57 did not mitigate punishment for any particular crime—it merely prohibited prosecutors from directly filing charges against juveniles in criminal court—it constituted an ameliorative change to the criminal law that the Legislature intended to extend as broadly as possible. (*Lara*, *supra*, 4 Cal.5th at p. 309.) The *Frahs* court reasoned that section 1001.36 was analogous to Proposition 57 in that it "is unquestionably an 'ameliorating benefit' to have the opportunity for diversion—and ultimately a possible dismissal." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.) The *Frahs* court also observed that the Legislature indicated an intent for section 1001.36 to apply broadly in section 1001.35, which states that the purpose of the pretrial diversion program is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).) The Sixth District agreed with *Frahs* in *People v. Weaver* (2019) 36 Cal.App.5th 1103, petition for review granted Oct. 9, 2019, S257049, as did Division One of the Fourth District in *People v. Burns* (2019) 38 Cal.App.5th 776, petition for review pending, S257738. Numerous other courts of appeal, including this one, have agreed with *Frahs* in unpublished opinions.

At least two courts of appeal have disagreed with *Frahs*. In *People v. Craine* (2019) 35 Cal.App.5th 744, review granted Sept. 11, 2019, S256671 (*Craine*), the Fifth District concluded that section 1001.36 is not retroactive. It reasoned that the

Legislature indicated an intent for the provision to apply prospectively because it specifically used "preadjudicative language," such as "charges." It further pointed out that "pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced." (*Craine*, *supra*, 35 Cal.App.5th at pp. 756-757.) "Early intervention cannot be achieved after a defendant is tried, convicted, and sentenced. The costs of a trial and incarceration have already been incurred. Moreover, because mental health diversion is generally only available for less serious offenses, the reality is many defendants would already be eligible for parole or some other form of supervised release by the time their cases were remanded for further proceedings." (*Id.* at p. 759.) The *Craine* court also observed that "retroactive application of the dismissal and expungement provisions of section 1001.36 would closely resemble a grant of felony probation under section 1203.4," which "would create a troubling loophole" through which defendants "could obtain greater expungement benefits than are available to probationers convicted of the same offense." (*Id.* at p. 758.) The *Craine* court was not persuaded otherwise by *Frahs*'s analogy to *Lara*, *supra*, 4 Cal.5th 299, which it found "inapt." (*Craine*, *supra*, 35 Cal.App.5th at p. 757.) Division Six of this district agreed with *Craine* in *People v. Torres* (2019) 39 Cal.App.5th 849, 855, petition for review pending, S258491, and added that "[d]ouble jeopardy principles compel non-retroactivity" of section 1001.36.

We find the reasoning in *Frahs* more persuasive and accordingly conclude that section 1001.36 applies retroactively. We further conclude that *all* of section 1001.36 applies retroactively, including the murder exclusion that was added by amendment. Contrary to defendant's argument, applying the

murder exclusion retroactively does not violate the ex post facto clauses of the federal or state constitutions (U.S. Const., art. I, §§ 9, 10; Cal. Const., art. I, § 9). (*People v. Cawkwell* (2019) 34 Cal.App.5th 1048, 1054.)

"A statute violates the prohibition against ex post facto laws if it punishes as a crime an act that was innocent when done or increases the punishment for a crime after it is committed." (*People v. White* (2017) 2 Cal.5th 349, 360.) "'Correspondingly, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates in the same manner as an ex post facto law.' [Citation.]" (*Ibid.*) The purpose of the ex post facto prohibitions is to ensure that people have "'fair warning' of the punishment to which they may be subjected if they violate the law; they can rely on the meaning of the statute until it is explicitly changed." (*People v. Cawkwell*, *supra*, 34 Cal.App.5th at p. 1054.)

Here, defendant murdered Gladys and Jeremy in 2010, eight years before section 1001.36 was enacted and then amended in 2018. There is no way he could have considered or relied on the possibility of receiving pretrial diversion when he committed the crimes. Moreover, the murder exclusion "did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for the offenses" with which defendant was charged. (*People v. Cawkwell*, *supra*, 34 Cal.App.5th at p. 1054.) Defendant was subject to the same punishment when he committed his crimes as he was after the Legislature narrowed the scope of defendants eligible for diversion under section 1001.36. Accordingly, the amendment does not violate the ex post facto clauses, and defendant is not eligible for mental health diversion under section 1001.36, subdivision (b)(2)(A).

II. Sufficiency of the Evidence

Defendant argues that the jury's sanity finding was not supported by substantial evidence. He further argues that the proper standard under which to evaluate this question is whether the evidence contrary to the sanity finding is of such weight and character that the jury could not reasonably reject it. We disagree.

A. Legal Standards

"Persons who are mentally incapacitated" are incapable of committing crimes under California law. (§ 26.) Mental incapacity is determined by the historic *M'Naghten* test, now codified in section 25, subdivision (b), which provides that a person may be found not guilty by reason of insanity only when he or she "proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time . . . of the offense."[7] As section 25, subdivision (b) states, the burden is on the defendant to prove his or her insanity by a preponderance of the evidence. (*Powell*, *supra*, 5 Cal.5th at p. 955; see also Evid. Code, § 522.)

Defendant contends that we should assess whether he made the requisite showing under an unusual standard

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[7] Although the statute uses a conjunctive *and*, the historic *M'Naghten* test used a disjunctive *or*. Our Supreme Court has held that section 25, subdivision (b) is "intended to embody the traditional *M'Naghten* test, which holds that insanity is demonstrated if a defendant was unable to understand the nature and quality of the criminal act *or* to distinguish right from wrong when the act was committed." (*Powell*, *supra*, 5 Cal.5th at p. 955, fn. 11.)

articulated in *Drew*, *supra*, 22 Cal.3d at pp. 350-351. In that case, the only two experts who testified during the sanity phase opined that the defendant was insane under the *M'Naghten* test. (*Drew*, *supra*, 22 Cal.3d at pp. 338-339.) The jury nevertheless found the defendant sane. (*Id.* at p. 339.) On appeal, the defendant argued the sanity finding should be reversed due to the uncontested evidence of his insanity. The Supreme Court rejected that position. (*Id.* at p. 350.) It explained that jurors "are not automatically required to render a verdict which conforms to the expert opinion." (*Ibid.*) It added that the defendant bore the burden of proof on the issue of sanity, and "if neither party presents credible evidence on that issue the jury must find him sane." (*Id.* at p. 351.) The court explained that under these unusual circumstances, "the question on appeal is not so much the substantiality of the evidence favoring the jury's finding as whether the evidence contrary to that finding is of such weight and character that the jury could not reasonably reject it." (*Ibid.*) Applying that standard, the court affirmed the jury's finding because both experts' testimony reasonably could be questioned and rejected. (*Id.* at pp. 350-351.)

Defendant acknowledges that *Drew* has been superseded by statute. As explained in *Powell*, *supra*, 5 Cal.5th at p. 956, *Drew* "adopted an alternative to the *M'Naghten* sanity test, a decision that was subsequently abrogated by the electorate with the 1982 passage of Proposition 8, which re-adopted the *M'Naghten* test." To the extent the *Drew* standard survived abrogation, *Powell* further explained that it applies only in the "specific context" of "a sanity trial in which the expert evidence of insanity was uncontested." (*Id.* at pp. 956-957.)

That specific context is not present here. Although

defendant points to "irrefutable and unanimous evidence that [he] suffered from a mental disorder and the prosecution's concession of such," expert agreement that defendant suffered from a mental disorder does not constitute agreement that the disorder impaired his sanity. "A defendant 'may suffer from a diagnosable mental illness without being legally insane under the *M'Naghten* standard.' [Citation.]" (*Powell*, *supra*, 5 Cal.5th at p. 955; see also *id.* at p. 958 ["although the testimony of defendant's experts provided strong evidence that defendant suffered from mental or emotional disabilities, that is not the same as legal insanity"].) Indeed, experts expressly disagreed on whether defendant was legally insane at the time of the murders: Drs. Ermshar and Booker opined he was, Dr. Tumu opined he was not, and Dr. Pitt wrote in her report that he was not but opined at trial he was. The expert evidence of insanity was not uncontested. *Drew*, to the extent it survives, does not apply.

Instead, we apply the "most common formulation of the substantial evidence test." (*Powell*, *supra*, 5 Cal.5th at p. 957.) Under that standard, we "review[ ] the entire record in the light most favorable to the jury's determination and affirm[ ] that determination if it is supported by evidence that is 'reasonable, credible, and of solid value.' [Citation.]" (*Ibid.*)

B. Analysis

Substantial evidence supports the jury's finding that defendant was sane at the time of the murders. Tumu opined that defendant's delusional disorder did not render him unable to appreciate the nature and quality of his actions. He further opined that defendant knew what he was doing was wrong. The rational 911 call defendant made immediately following the murders, in which he recognized his own wrongdoing, supports

the conclusion that defendant was sane. So too does defendant's detailed interview with law enforcement, in which defendant acknowledged it would be illegal for him to track Manyweather and admitted he decided against killing Manyweather because he did not want to be found lying in wait.

Defendant suggests Tumu's examinations of him were too short for Tumu to properly assess him, particularly where his own expert, Dr. Pitt, spent 15 hours with him. Defendant ignores that at least one of his own experts, Dr. Botezan, spent only 30 minutes with defendant, and testified that "a psychiatric interview is designed to be done in 30 minutes or less." More importantly, the length of an expert's assessment is not the only factor the jury may have taken into consideration when deciding which expert(s) to credit; the experts offered varying credentials, specialties, methodologies, diagnoses, and, presumably, in-court demeanor. "The issue of legal sanity is . . . a complex and uncertain one about which fully competent experts can reasonably disagree." (*Powell*, *supra*, 5 Cal.5th at p. 958.) So long as the experts were adequately qualified, which defendant does not dispute, the jury was entitled to evaluate and weigh their opinions. (*Ibid.*) "Nothing more is required to constitute substantial evidence." (*Ibid.*)

Defendant also argues that Tumu's opinion was "inconsistent" with his determination that defendant's delusions were the basis for his actions. As pointed out in *Powell*, however, "[a] defendant 'may suffer from a diagnosable mental illness without being legally insane . . . ." (*Powell*, *supra*, 5 Cal.5th at p. 955.) If defendant knew what he was doing and knew that it was wrongful, he was not legally insane despite suffering from or even being motivated by jealous delusions. Defendant asserts that it is

not "inconsistent with insanity that [he] knew it was legally wrong to kill," because he "was compelled to do so by his delusion." He does not cite to any record evidence or legal authority in support of this assertion, and we are not persuaded by it. The experts agreed that defendant suffered from delusions, but whether the delusions compelled him to murder Gladys and Jeremy, who was not a subject of the delusions, was a question for the jury. Tumu's testimony, as well as the testimony from the other prosecution experts and evidence that defendant nearly shot his father before serving in Vietnam gave the jury a substantial basis from which to conclude the delusions did not compel his actions.

III. Firearm Enhancements

The jury found true allegations that defendant personally and intentionally discharged a firearm, thereby proximately causing the deaths of Gladys and Jeremy. (§ 12022.53, subd. (d).) The court sentenced defendant to two additional terms of 25 years to life as mandated by section 12022.53, subdivision (d). At the time of the March 8, 2018 sentencing, the trial court had discretion to strike or dismiss the enhancements pursuant to section 12022.53, subdivision (h), which became effective January 1, 2018.

Defendant argues that we should remand the matter for the court to exercise that discretion, because "there was no indication the sentencing court was aware of the discretion to strike the enhancements and there is no indication discretion was exercised." As evidence that the court was unaware of its discretion, defendant points to remarks the court made before imposing sentence: "The court is mandated to impose certain sentences by operation of law and has no discretion relative to

those sentences. I do have discretion whether or not to run sentences concurrently or consecutively." He also notes that the prosecution failed to mention the court's discretion in its sentencing memorandum.

Defendant overlooks his own failure to bring the matter to the court's attention, either by filing a sentencing memorandum or orally mentioning section 12022.53, subdivision (h) at the sentencing hearing.[8] This failure is fatal to his appellate claim. "[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) The court expressly asked defendant if he "wish[ed] to address the court with regards to the sentencing choices," and he declined the opportunity. Defendant accordingly cannot raise the issue now.

Even if he could, we are not persuaded that the court was unaware of its discretion. "The general rule is that a trial court is presumed to have been aware of and followed the applicable law." (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496-497.) In an analogous situation, a court was presumed to have been aware of sentencing discretion it acquired 53 days earlier pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 where

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[8] Defendant suggests, in his reply brief, that counsel may have been ineffective for failing to apprise the court of its discretion. Defendant forfeited this argument by raising it for the first time in his reply brief. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1218; *People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9 ["It is rarely appropriate to resolve an ineffective assistance claim on direct appeal [citation]; we certainly will not do so where, as here, the claim is omitted from the opening brief and thus waived."].)

the record demonstrated "a complete absence of any evidence the trial judge was unaware of the scope of his discretion." (*People v. Mosley*, *supra*, 53 Cal.App.4th at p. 499.) That is the situation here. The comments the trial court made did not specify which sentences it was mandated to impose; the court simply said it had to impose "certain sentences by operation of law and has no discretion relative to those sentences." The trial court may well have been referring to the murder sentences, over which it indeed had no discretion. (See § 190.) We do not presume error. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1229.)

IV. Fees, Assessments, and Restitution Fine

The trial court ordered defendant to pay a $40 court security fee for each count (§ 1465.8, subd. (a)), a $30 criminal conviction assessment for each count (Gov. Code, § 70373, and a restitution fine of $5,000 (§ 1202.4). Defendant contends the fees, assessments, and fine must be vacated under *People v. Dueñas, supra,* 30 Cal.App.5th 1157, because the trial court did not consider his ability to pay.

Defendant did not object to the imposition of the assessments or the fine in the trial court, even though the fine substantially exceeded the minimum amount set forth in section 1202.4, subdivision (b)(1). His failure to object effects a forfeiture of this argument on appeal. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; see *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155.)

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.